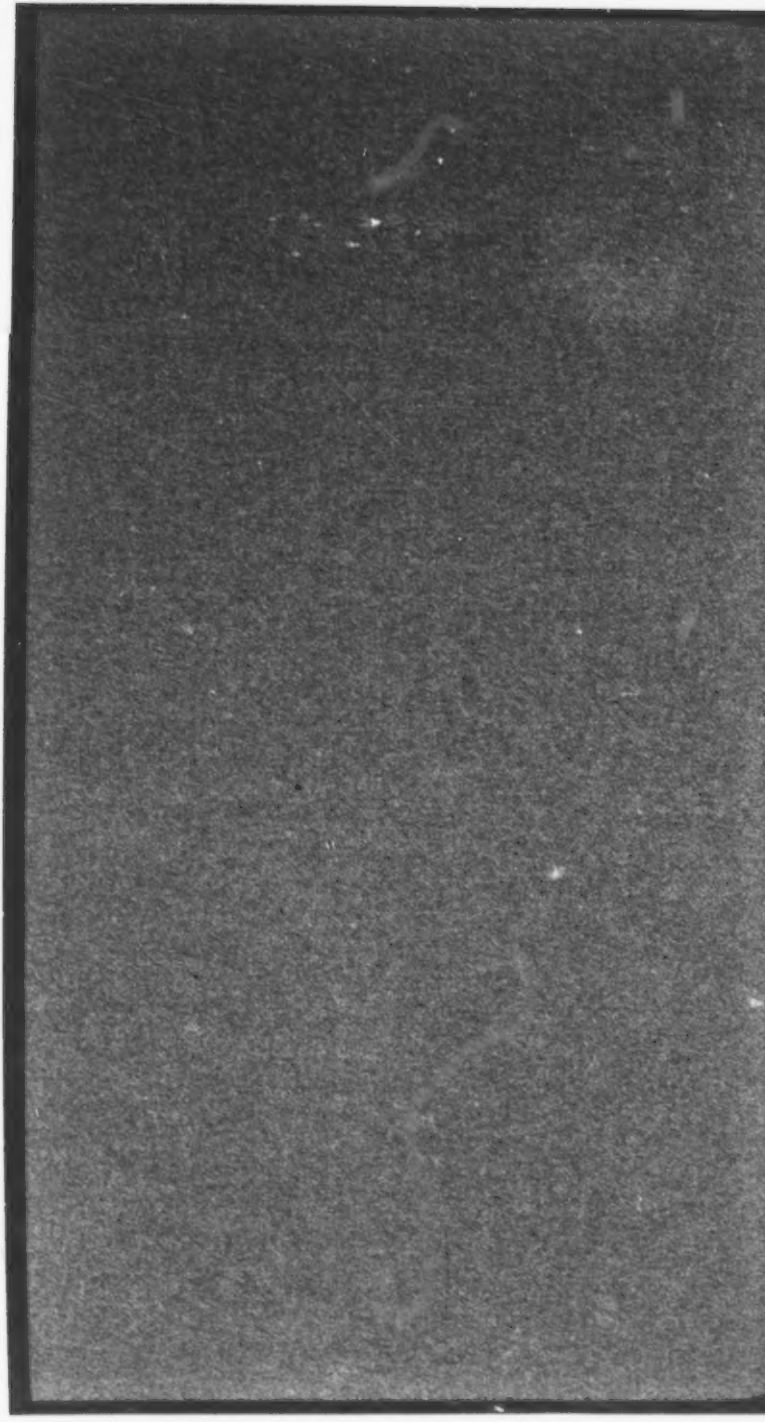

Supreme Court of the United States.

October Term, 1904. No. 182.

Pennsylvania Lumbermen's Mutual Fire Insurance Company,

Plaintiff in Error,

vs.

Charles C. Meyer,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover upon three policies of insurance issued by the plaintiff in error upon saw mill property in Rochester, N. Y. The action was originally commenced in the Supreme Court of the State of New York, and upon application of the plaintiff in error was removed into the United States Circuit Court for the Western District of New York. After the case had been so removed into the United States Circuit Court, the insurance company moved to set aside the service of the summons upon the ground that it was a foreign corporation and was not doing business in the State of New York, and that the Supreme Court of that State acquired no jurisdiction of it by the service of process on one of

its resident directors within that State. The Circuit Court decided that the insurance company was doing business in the State of New York, that service of the summons on one of its directors within the State was sufficient, and denied the motion. The decision is reported in 108 Fed. Rep. 169. The case was tried before the court without a jury and resulted in a judgment for the plaintiff (defendant in error). Upon a writ of error to the United States Circuit Court of Appeals, that court rendered a decision affirming the judgment of the Circuit Court upon the merits, but at the request of the plaintiff in error certified the question of jurisdiction to this court, and withheld the formal entry of judgment until that question should be determined. The case in the Circuit Court of Appeals is reported in 126 Fed. Rep. 352, and 61 U. S. Cir. Ct., App. R. 254.

The plaintiff in error insists strenuously that the State court never acquired jurisdiction over it by the service of the summons on one of its directors within that State, and this contention is based upon three grounds.

First.—That the cause of action did not arise within the State of New York, and that therefore, even under the practice code of that State, the service was void.

Second.—That the plaintiff in error, a foreign corporation, was not doing business in that State, and under the decisions of the United States courts it could not be sued in that State, and

Third.—That even if it were doing business in that State, a director who took no part in the business of the Company within the State is not a proper officer or agent of the corporation upon whom a valid service of process can be made.

I shall consider each one of these grounds of objection separately.

FIRST.

The service of the summons upon the defendant (plaintiff in error) was sufficient under the laws of New York.

Section 432 of the Code of Civil Procedure of that State which provides for the manner of serving mesne process on a foreign corporation reads as follows:

> Sec. 432. Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:
>
> 1. To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.
>
> 2. To a person designated for the purpose by a writing under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the State, as the office or residence of the person designated; and if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated, may from time to time, change the place specified as his office or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.
>
> 3. If such a designation is not in force, or if neither

> the person designated, nor an officer specified in sub-division first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

It is conceded that the company had no designated agent in New York and that the officers mentioned in sub-division 1 of the section were not within that State. The service of the summons was therefore made in pursuance of the provisions of sub-division 3 of that section. It is admitted that the service was made on a director of the company, but it is urged that the cause of action set out in the complaint did not arise within that State, and hence the service was insufficient.

It is submitted that the cause of action did arise within the State of New York. A policy of fire insurance is essentially a contract of indemnity. Although the policies in suit are not set out in full in the certificate from the Circuit Court of Appeals to this court, yet the standard fire insurance policy is of such general use that the courts will take judicial notice of its provisions. Indeed, the use of the standard fire insurance policy in the insurance of property in the State of New York, whether insured by a domestic or a foreign insurance company, is made obligatory by the laws of that State (Laws of 1892, chap. 36, sec. 121). By the express terms of the policy the company agrees to indemnify the insured against loss by fire in either one of two ways at its option; by repairing or rebuilding the property damaged or destroyed, or by paying the loss, to the extent of its liability, in money. In either form of indemnity the loss is to be made good to the insured where it occurs. If the company elects to indemnify the insured by restoring the property damaged by fire, it obviously can only perform the contract on its part where the property is situated, and the injury has been sustained. If on the other hand, it chooses to pay

the equivalent of the loss in money, it is equally its duty to make the payment where the loss occurs. In the present case the insured property was located in the State of New York, where the defendant in error also resided. It was there that the insurance company, by its contract of insurance, agreed to indemnify him against the loss, which he has sustained, and it is there that the company's default occurred by reason of its failure to perform its contract.

The claim which is repeatedly made in his brief (pp. 11, 32) by the counsel for the plaintiff in error, that, under the terms of the policy, the loss is to be paid at the company's office in Pennsylvania, cannot be sustained. The policies are absolutely silent as to the place of payment, and in the absence of any provision on the subject in the policy, the fair and reasonable presumption is that the payment of money, if the company elects that form of indemnity, shall be made where the loss occurred.

Another elementary principle may be invoked at this point, and that is, that in contracts for the payment of money, if the instrument is silent as to the place of payment, it is the duty of the debtor to seek out the creditor and make payment to him at his place of residence. This rule is not affected by the fact that the parties happen to reside in different States, unless the diversity of state residence is owing to the removal of the creditor into another State subsequent to the execution of the contract. If A, residing in Pennsylvania, makes his note or bond payable to B, who resides in New York, it, in the absence of anything in the instrument or in the surrounding circumstances to indicate a different place of payment, is payable in the latter State.

Sanderson vs. Bower, 14 East, 517.
Hale vs. Patton, 60 N. Y. 233.
Dockham vs. Smith, 113 Mass. 330.

If the policies in suit are to be held to create a liability

on the part of the company, in case of loss, for the payment of money, in other words, a debt, and such is undoubtedly the effect of the instrument in case the company neglects to avail itself of the option to indemnify the insured by restoring the property, then the rule just referred to would seem to apply, for, to quote the words of an eminent author, *Wood on Fire Ins.*, 322 (2d ed.):

> "Immediately upon the happening of the loss, the 'loss of the assured, to the extent of the amount 'insured, becomes a debt against the company which 'it is bound to discharge as other debts are dis-'charged."

Where the cause of action in the present case arose is not determined by the question of where the contract was made, but by where it was to be performed by the company in the event of a loss occurring to the insured property. That depends upon the terms of the contract construed in relation to the nature and *situs* of the subject matter. The terms of the policy and the company's obligation thereunder would remain the same, whether the policy was issued direct from the home office in Philadelphia, or through a duly established agency in the State of New York, but had the policies in fact been issued through a local agent in New York, it would hardly be contended that the cause of action did not arise in that State.

That the contract represented by a fire insurance policy, is, in case of a loss under it, to be performed on the part of the company where the insured property is situated and the loss occurs, is indicated in the discussion of the subject in *LaFayette Ins. Co. vs. French*, 18 How. 404, where the court uses the following language:

> "We find nothing in this provision either unreason-'able in itself or in conflict with any principle of 'public law. It can not be deemed unreasonable that 'the State of Ohio should endeavor to secure to its 'citizens a remedy, in their domestic forum, upon this 'important class of contracts made and to be per-'formed within that State, and fully subject to its

'laws; nor that proper means should be used to com-
'pel foreign corporations transacting this business of
'insurance within the State, for their benefit and profit,
'to answer therefor the breach of their contracts of
'insurance there made and to be performed."

And also in *Paul vs. Virginia* 75 U. S. 168, where at page 183 the court says:

"The policies are simply contracts of indemnity
'against loss by fire entered into between the cor-
'poration and the insured for a consideration paid by
'the latter. . . . . Such contracts are not inter-
'state transactions though the parties live in different
'states. The policies do not take effect, are not exe-
'cuted contracts, until delivered by the agent in Vir-
'ginia. They are then local transactions and are
'governed by the local laws."

Again if the contention be true, that a loss under the policies issued by the company is payable only at its office in Philadelphia, and that in default of payment a breach of the contract on its part occurs, and in consequence, a cause of action arises, there and nowhere else, it necessarily follows that in the event of a loss occurring anywhere under one of its policies, unless the company had expressly denied any liability on its part, the insured in order to maintain an action on his policy must first demand payment of the company at its home office, for otherwise, the company might defeat his action by showing that it had, at all times, been ready to pay at it office where the loss was payable. This I apprehend would be regarded by both the courts and the legal profession as a novel and startling doctrine.

Upon principle, therefore, it seems to me very clear that the cause of action in this case arose in the State of New York, and that under the laws of that State the State court acquired jurisdiction of the plaintiff in error by the service of the summons on one of its directors within the State. That such is the construction placed upon the provision of its code of Civil Procedure under

consideration, by the courts of that State there can be no doubt. I cite one or two cases:

Childs vs. Harris Mfg. Co., 104 N. Y. 477.

It appeared in that case that defendant, a corporation created under the laws of, and doing business in Wisconsin, sold plaintiffs, who were doing business in New York, certain agricultural implements with an agreement to indemnify them against claims for infringement of any patent, provided notice was given to it of any suit for infringement, and it was allowed to take charge of the case. Plaintiffs were afterwards sued for an alleged infringement of a patent. They notified the defendant of the suit and requested it to take charge of the defense. This it did not do and judgment was recovered in that action against the plaintiffs, which they paid. They then commenced this action by service of the summons on a director of the defendant within the State. Defendant thereupon moved to set the service aside on the ground, (1) that it was not made on the proper officer, (2) that the defendant has no property in the State, and (3) that the alleged cause of action did not arise within the State. The Court of Appeals, Judge Danforth writing the opinion, says at page 480:

> "It was enough if the cause of action arose in the 'State and Crosby was in fact one of defendant's 'directors. (Code sec. 432, subn. 3). As to the cause 'of action, it accrued when the defendant failed to 'perform its its contract, and by reason of its failure 'plaintiff sustained a loss. These events occurred in 'this State. . . . . It is immaterial that the con- 'tract to indemnify was made in Wisconsin, its (de- 'fendant's) obligation was to be discharged wherever 'the plaintiffs were vexed by litigation."

Although the doctrine of this case, in so far as it holds that a foreign corporation which is not engaged in business in the state may be sued in the courts of the state, has been disapproved in the United States Courts,

its decision as to the cause of action, and where it arose, has, so far as I am aware, never been criticised.

An analogous question arose in *Ithaca Fire Department vs. Beecher*, 99 N. Y. 429. Defendants, who were insurance agents in New York city, were sued in Tompkins county to recover a penalty for their failure to pay the license for insuring property in the city of Ithaca prescribed by chapter 465 of the Laws of 1875. Defendant moved for a change of venue to New York county, on the ground that the cause of action arose in that county and should have been brought there, under sec. 983 of the Code of Civil Procedure. The Court of Appeals overruled that contention and in the course of its opinion at page 432 said:

> "We think the whole cause of action arose in the 'village of Ithaca. The percentage of premiums was 'required to be paid there; the bond was required 'to be given there; the penalty was payable there, 'and the insurance was effected upon property situ-'ated there. Out of some or all of those facts the 'cause of action arose. It matters not where the 'contracts of insurance were actually signed, they 'took effect upon property in the village of Ithaca."
>
> "The construction contended for by the defendants 'would allow the agents of foreign insurance com-'panies, provided they issued policies outside of the 'State, to carry on their operations within the State, 'without incurring any penalty under the statute, as 'it can operate only within the State. A construc-'tion which would lead to such a result should not 'be adopted unless a fair interpretation of the law 'and facts require it."

It was held in *Greiser vs. Mass. Benf. Assn.*, 39 N. Y. State R. 1, that the cause of action on a policy of the defendant, a foreign corporation, arose within this State, where the death of the insured occurred at her residence in this State.

To the same effect are *Fidelity Mutual Life Assn. vs. Fieklin*, 21 Atl. R. 680 and *Burckle vs. Eckart*, 3 N. Y. 132.

As to whether the service of process issued by a State court will be deemed sufficient under the laws of that State, the decisions of the highest courts of the State on that point will be regarded as controlling upon the Federal Courts.

Exparte Schollenberger, 96 U. S. 369.
Northwestern Mut. Ins. Co. vs. Woodworth, 111 U. S. 146.
Amy vs. Watertown, 130 U. S. 301.

This deference to the decisions of the State courts only extends to the construction of the State statutes regulating the service of process, and does not embrace the broader question, whether the service of process on a non-resident, whether an individual or a corporation, authorized by the laws of the State, is reasonable or not. This brings me to the second objection which is made to the validity of the service of the summons on the plaintiff in error in the State Court, viz: that the company was not doing business in the State of New York.

SECOND.

The plaintiff in error was doing business in the State of New York at the time the cause of action accrued, and also at the time the action was commenced.

It may be noted at the outset, in the discussion of this point, that the question involved in this case is not, whether the company is engaged in transacting business in New York in such a manner as to subject it to the severe penalties which by the laws of that State are imposed on foreign corporations doing business in the State in violation of its laws. Those statutes, and the similar statutes of other states, are highly penal in their provisions and subject the offending corporation, in certain cases, to heavy fines, in other cases, to a forfeiture of its contracts, and in other instances to both fines and forfeit-

ures. Many of the cases cited by counsel for the plaintiff in error arose under such statutes and involved their construction. They have only a remote, if any, bearing on the present case.

The question which arises and is to be determined here is, was the company doing business in New York to such an extent, or in such a way, as to permit of its being sued in the courts of that State? The statutes of the State authorize such an action.

Section 1780 N. Y. Code Civ. Pro., which reads as follows:

> Sec. 1780. "An action against a foreign corporation may be maintained by a resident of the State, or 'by a domestic corporation, for any cause of action. 'An action against a foreign corporation may be maintained by another foreign corporation or by a non-'resident in one of the following cases only:
>
> (1) 'Where the action is brought to recover for 'the breach of a contract, made within the State, or 'relating to property situated within the State, at 'the time of the making thereof.
>
> (2) 'Where it is brought to recover property situate within the State, or a chattel, which is replevied within the State.
>
> (3) 'Where the cause of action arose within the 'State, except where the object of the action is to 'effect the title to real property situated without the 'State."

Now let us examine the facts as certified to this court, in order to see if they are sufficient to justify the trial court in holding, in support of its jurisdiction of the plaintiff in error, that it was doing business in the State of New York, for the presumption is that that court has found every fact essential to its jurisdiction, of which there is proof or evidentiary facts to support it.

In the first place it should be kept in mind that the company is engaged in the business of insuring immovable property consisting of mills and other buildings

against loss by fire. In the prosecution of that business the court below certifies that

> "Ever Since the plaintiff in error was incorporated it 'has been engaged in the business of insuring property located in the 'State of New York and other 'States against loss by fire, and has sent by mail circulars from Philadelphia into said State soliciting 'business. In the prosecution of its business and for 'the purpose of increasing it, the company sends its 'general manager to the different conventions of 'lumbermen held in the State of New York for the 'purpose of urging upon those attending upon such 'conventions the advantage of insuring with it. It 'sends its adjusters into the State of New York when 'a loss by fire occurs there to property insured by 'it, for the purpose of adjusting the amount of such 'loss. It originally placed insurance upon the property covered by the policies in question after its 'manager had pointed out the advantage of insuring 'in the company, the conversation being had at the 'city of Rochester, in said State."
>
> "At the date of the service of the summons, as 'aforesaid, the said company had, and now has, about 'nine hundred thousand dollars ($900,000) outstanding 'standing insurance on property within the State of 'New York, which is something less than one-third 'of its total risks. The applications therefor were 'made by mail, addressed to it at Philadelphia, and 'the policies were executed and issued at that city 'and sent by mail from there to the insured within 'the State of New York."

Tested by the dictates of common sense, and the rules which prevail among business men, the facts here disclosed establish conclusively that the company is doing business in New York, and the Circuit Court was abundantly justified in reaching that conclusion. If it be held in the face of these facts, that the company is not doing business in that State it must be in deference to some technical rule of law, the subtle meaning and force of which, are incomprehensible to the lay mind. What amounts to doing business in the legal sense, and what

to doing business according to ordinary business standard, may. if the contention of counsel is correct, be entirely different things. I do not think that any such distinction exists, but that what constitutes doing business according to common judgment, is the test, within the intent of the rule which we are now considering.

A brief consideration of the facts is, it seems to me, all that is necessary. It is manifest, that from the beginning, it has been the settled policy of the company to exploit its business in the State of New York to the utmost extent, and so dilligent and successful have its efforts been along this line that nearly one-third of its insurance is upon property in that State.

Its policies are contracts of indemnity to make good to the insured any loss which he may sustain by fire, and within the contemplation of the law such indemnity or making good the loss must have effect where the loss occurs. Furthermore, under the terms of the policies the indemnity may at the company's .option be made either by the actual rebuilding or restoration of the property destroyed or damaged, or by compensating the insured for the loss by its equivalent in money, either of which forms of indemnity must be made where the loss occurs. The performance of the contract of insurance by the company is as much a part of its business as the making of the contract. The appraisal and adjustment of losses is therefore as much an integral part of its business as the issuing of the policies, but whatever may be claimed by the plaintiff in error as to the place where it makes and issues its policies, it is undisputed that the adjustment of the losses which occur in the State of New York is made in that State.

The company makes a practice, and has from the outset, of sending its adjusters into that State for the purpose of settling losses which occur under its policies there. It sends its general manager to the different lumbermen's conventions held in that State, for the purpose of attract-

ing business there, and it floods the States with its circulars soliciting local insurance. It originally procured insurance on the property in question through the personal solicitation of its general manager at the city of Rochester, N. Y.

In view of the nature of the company's business it is apparent that in the most essential and vital respects it is conducting a substantial part of its business in the State of New York.

In support of its claim that notwithstanding that nearly one-third of its business is within that State, nevertheless it is not doing business there, the plaintiff in error relies upon two circumstances, (1) that it has not complied with the laws of that State authorizing it to do business there, and (2) that it does not maintain a local office or employ local agents within that State. The first suggestion simply amounts to this, that because the company is not doing business *lawfully* within the State, therefore it is not doing business there at all. It will not, I apprehend, be necessary to dwell longer on this point. For the purpose of permitting suit to be brought against it in the courts of that State, the same business conduct on its part within the State which will suffice, in case it was lawfully there, will also be sufficient where it is attempting to do business there in violation of State laws.

It is undoubtedly true that the plaintiff in error had not complied with the laws of the State of New York, so as to permit it lawfully to engage in the fire insurance business within that State; but it is equally true that it has been, at all times since its organization, diligently striving to reap the benefits which the conditions and opportunities in that State offer to those engaged in the business of fire insurance, without assuming the burdens and responsibilities which the laws of that State impose upon domestic and foreign fire insurance companies alike, and with what to it must be gratifying success.

There remains to be considered the other point, viz. that it is not doing business in New York, because it does not maintain an office or employ local agents there. The statement in the certificate on page 3 that "the company 'has no agent or officers within that State and has not had 'at any time," has reference, of course, to permanent local agents within the State. The answer is that neither a local office nor local agents are essential to enable an insurance company to do business in a foreign state. No well considered case decides any such doctrine, while in the *Spratley case*, 172 U. S. 602, this court said:

> "It cannot be said with truth, as we think, that an 'insurance company does no business in a State unless 'it have agents therein who are continuously seeking 'new risks, and it is continuing to issue new policies 'upon such risks."

Indeed, the counsel for the plaintiff in error, while strenuously insisting upon the validity of his contention in one part of his brief, in another part seems to concede its inherent vice, for at page 12 he says:

> "The business of the foreign corporation might be 'of such a character as to necessarily involve posses- 'sion of, or title to, or work upon, property in the 'foreign State, or the corporation might, for its own 'convenience, voluntarily send its agents into the 'foreign state to solicit or execute or perform its 'contracts."

That is precisely what we contend the company has done; that ever since it was organized, it has, from time to time, sent its agents into the State of New York "to solicit or execute or perform its contracts," in relation to its business there.

The acts which a local agent does in the prosecution of the company's business may be done by an agent or representative of the company who resides outside the the State, but who comes into the State from time to time for that purpose. Nor is it essential that the business be carried on there continuously. It is certainly

sufficient if, in pursuance of the settled policy of the company, its agents go into the State and there perform certain duties and acts in the promotion of the company's business. Neither is it important that all branches of the company's business should be carried on within the State. Nor is the extent or amount of business carried on there controlling. What the Federal Courts do hold is that before a state court may acquire jurisdiction over a foreign corporation, in a suit against it, it must be doing some business in that State.

In the case of a fire insurance company the issuing of policies is not all there is of its business: indeed the filling out and executing the policy is the least part of that branch of its operations which consists in "getting business." The real work of getting business are the soliciting and the arguments used which finally convince the owner of the benefits of insuring with the company, and which induce him to take a policy. The filling out of the application on the one side, and the policy on the other are only the formal parts of the contract.

The plaintiff in error it seems confines its insurance to certain kinds of risks. Its customers are mainly lumber dealers, and the owners of saw mills. It solicits business largely by means of its circulars which are distributed through the mails. It makes the post office department, and its employees, in whatever state their duties are performed, its agents in the prosecution of that branch of its business. That is one of the means by which it procures risks in the State of New York. But it is not the only means. In the words of the certificate, "In the 'prosecution of its business and for the purpose of 'increasing it, the company sends its general manager to 'the different conventions of lumbermen held in the State 'of New York for the purpose of urging upon those 'attending upon such conventions the advantages of 'insuring with it." The company well knows that property owners must first be persuaded of the advantages of

insuring with it before they will apply for insurance, hence the supreme importance of having that branch of its business well attended to. It is in the prosecution of that part of its business that it sends its general manager to the lumbermen's conventions. He goes there, where he can meet a hundred or more possible customers, to engage in the same line of work for his company in extending its business, that he would do if he should visit each of them at his place of business, for the purpose of soliciting his insurance. It is fair to assume that it is through these means, the distribution of its circulars throughout the State and the personal solicitation of its general manager within the State in the manner stated, that the company has been enabled to secure the large amount of insurance which it has placed on property in that State. It was in this way that its original policies of which those in suit are the renewals were placed on the insured property through the personal solicitation of its general manager at Rochester, N. Y.

But the making of Insurance contracts and the issuing of policies is not the whole of the company's business. The adjustment of losses and the settlement of claims are equally a part of its business. In carrying on this branch of its business so far as it relates to risks in the State of New York, the company sends its adjusters into that State, whenever a loss occurs there, to adjust the amount of the loss. The learned counsel for the plaintiff in error contends that there is nothing in the record to show that the adjusters "were other than mere appraisers sent to estimate the value of the goods and the amount of the loss and report to the company." This contention finds no warrant in the language of the certificate from the court below. The court certifies,

> "It sends its adjusters into the State of New 'York when a loss by fire occurs there to prop-'erty insured by it, for the purpose of adjusting 'the amount of such loss."

The duties of an insurance appraiser and of an insurance adjuster are very different. It is the business of an insurance adjuster to settle the amount of loss with the insured, to adjust the same. As defined by Webster, "To *adjust* in its fair meaning, is to settle or bring to a satisfactory state so that the parties are agreed in the result."

Mayor vs. Hamilton Fire Ins., 39 N. Y. 45.

It is a matter of common knowledge, of which courts will take judicial notice, that in ninety-nine cases out of one hundred, fire losses of more than a trifling amount are settled through the agency of the company's adjusters. The matter of settling losses or of agreeing with the owners upon the amount of the loss is a very important feature of the business of fire insurance. It will scarcely be contended that if the plaintiff in error maintained a permanent office in New York for an agent whose business it was to adjust the losses occurring in that State, it would not be doing business there, but in that case its local adjuster would only be doing, in that State, what, under the present methods of conducting its business, is done by the adjusters which it sends into the State.

If the company had complied with the laws of the State of New York, in order to enable it to do business lawfully in the state, and in pursuance of that permission instead of maintaining local offices and employing local agents it had seen fit to conduct its business in that State, by the methods and in the manner, it has actually followed, there could then have been no question about its doing business in the State. But merely taking the requisite steps to comply with the laws of New York is not doing business in that State. What acts, after those steps have been taken, will amount to doing business in the State, must of necessity have the same result although no such steps have been taken. The only effect of a compliance with the State laws is to make lawful business dealings which otherwise would be unlawful.

To recapitulate, (1) It is the settled policy of the company, and has been since its organization, to exploit its business in the State of New York. (2) In order to attract business there it distributes its circulars in that State through the agency of the U. S. mails. (3) For the same purpose it sends its general manager into the State from time to time to urge upon the lumbermen whenever he can find them gathered together in sufficient numbers, the advantages of taking out insurance in his company. (4) It makes a practice of sending its adjusters into the State to adjust the losses as they occur. (5) So successful has been this method of conducting its business in that State that nearly one-third of its entire insurance is placed there. In view of these facts can it truthfully be said that the company is not transacting any part of its business in the State of New York?

It has long been the settled policy of the different States, including New York (L. 1892, chap. 690, secs. 25–36. Sec. 1780, Code Civ. Pro.) to require foreign corporations doing business in the State to submit to be sued in the State courts. This policy has been sanctioned and commended by the Federal Courts. And it is immaterial, so far as its liability to be sued in the State courts is concerned, that the foreign corporation is doing a clandestine business in the State. The rule is well expressed in the *Spratley case*, 172 U. S. 602, where the court in the course of its opinion says:

> "A vast mass of business is done throughout the 'country by corporations which are chartered by 'States other than those in which they are transact-'ing part of their business, and justice requires that 'some fair and responsible means should exist for 'bringing such corporations within the jurisdiction 'of the courts of the States where the business was 'done, out of which the dispute arises."

This is no new doctrine, but has been repeatedly declared and enforced by this court since the case of

Lafayette Ins. Co. vs. French, 19 How. 404.
See also *Ex parte Schollenberger*, 96 U. S. 369.
R. R. Co. vs. Koontz, 104 U. S. 10.

Upon the question whether the plaintiff in error was doing business in New York it seems to me that the case of *Connecticut Mut. Fire Ins. Co. vs. Spratley*, 172 U. S. 602, already cited is decisive. There, as in this case, the jurisdiction of the State court over the defendant, a foreign corporation, was involved. Action had been brought against the insurance company in the State court of Tennessee by service of process on an agent of the company who was temporarily within the State. The company had at one time carried on business in the State through local agents, but in 1894 it withdrew all its agents from the State and ceased issuing any new policies in the State, and notified the Insurance Commissioner to that effect. It had, however, a number of policies outstanding in the State and it continued to receive premiums on these policies through its former agent and to settle by payment or otherwise the claims upon the policies in that State as they fell due. The former agent resided in Louisville, where he received payment of the premiums, and it did not appear that he was in the State of Tennessee when any payment of premiums was made to him by Tennessee policy holders. Spratley died in 1896 and the company sent its investigating agent to Memphis, solely to adjust the claim, and while there endeavoring to settle the claim, action was brought on the policy against the company by service of process on him.

The proof of service recited that the defendant was doing business in Shelby County, Tenn., but that it had no office or agency there. The Supreme Court held the service to be sufficient. In the course of its opinion, the court says:

"We think the evidence in this case shows that 'the company was doing business within the State

'at the time of the service of process. From 1870 'until 1894, it had done an active business through-'out the State by its agents therein, and had issued 'policies of insurance upon the lives of citizens of 'the State. How many policies it had so issued does 'not appear. Its action in July, 1894, in assuming to 'withdraw from the State, was simply a recall of its 'agents doing business therein, the giving of notice 'to the State insurance commissioner, and a refusal 'to take any new risks or to issue any new policies 'within the State. Its outstanding policies were not 'affected thereby, and it continued to collect the pre-'miums upon them and to pay the losses arising 'thereunder, and it was doing so at the time of the 'service of process upon its agents.

"It cannot be said with truth, as we think, that an 'insurance company does no business within a State 'unless it have agents therein who are continuously 'seeking new risks and is continuing to issue new 'policies upon such risks. Having succeeded in tak-'ing risks in the State through a number of years, it 'cannot be said to cease doing business therein when 'it ceases to obtain or ask for new risks, or to issue 'new policies, while at the same time its old policies 'continue in force and the premiums thereon are con-'tinuously paid by the policy holders to an agent 'resident in another State, and who was once the 'agent in the State where the policy holders resided. 'This action on the part of the company constitutes 'doing business within the State, so far as is neces-'sary, within the meaning of the law upon this sub-'ject. And this business was continuing at the time 'of the service of process on Mr. Chaffee in Mem-'phis."

That it is not essential, in order to enable a foreign corporation to carry on business in a State, for it to maintain a local office or employ local agents there, is held in *Chattanooga Bldg. & Loan Association vs. Denson*, 189 U. S. 408. In that case, plaintiff, a Tennessee corporation, brought an action in Alabama to foreclose a mortgage on property in that State. The defense was that the loan was illegal because the Association had not complied

with the laws of Alabama in regard to foreign corporations doing business there.

The question was whether the Association was in fact doing business in that State. It was conceded that it had no local office or agent in Alabama; it had, however, a traveling agent whose business it was to solicit subscriptions to its stock, and to obtain applications for loans, and submit the same to the home office of the Association at Chattanooga and the loan in question was procured in that way.

The court at p. 414 says:

> "The petitioner is a Building and Loan Association. Its corporate purpose is to lend money to its stockholders. The respondent Denson was one of its stockholders, and manifestly regarding the essence of the transaction between them, this constituted a doing of business within the State of Alabama. But it is insisted that on account of the form and terms of the instrument, and by operation of law, the loans must be regarded as having been made in Tennessee. It is said the note and mortgage were drawn in Tennessee and by their express terms were payable in there. . . . Further, the petitioner's part of the transactions was performed in the State of Tennessee. The application of Denson was presumably solicited as other applications were, and if what was done in pursuance of it did not constitute doing business in the State, the effect would be as expressed by the Circuit Court of Appeals that petitioner and other foreign corporations engaged in the same business of loaning money on real security may safely flood the State of Alabama with its soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions, as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the State."

The case of *New Haven Pulp and Board Co. vs. Downington Mfg. Co.* 130 Fed. Rep. 605 is to the same effect.

In that case defendant, a Pennsylvania corporation, was sued in Connecticut by service on one of its agents temporarily within that State. It had never had an office or local agent in that State, had not complied with the laws of that State to enable it to carry on business there, but the proofs showed that it had sent its agent into the State and there negotiated sales of the products of its factory to a limited extent. On plea in abatement and to the jurisdiction, the court said:

> "The court did not invite the cause, but it is here 'and unless an inexorable sanction exist, it is not in-'clined to force a domestic corporation to migrate 'to a foreign forum in search of justice. It would 'seem ungracious for the defendant to permit its 'agent to visit Connecticut concerning matters which 'touch one branch of the transaction, and to object 'to service upon such agent of a notice that the plain-'tiff seeks to recoup in one direction what it has 'lately lost in another. The stipulation sufficiently 'states acts of business done by the defendant to sus-'tain the validity of the service. . , . It is impos-'sible to assent to the proposition that doing business 'within a state means a persistent or continuous con-'dition of doing or offering to do business, usually 'leading to the appointment of an agent or the estab 'lishment of an office within the State." (p. 608.)

See also Firemen's Ins. Co., 155 Ill. 204.

As was said in *Barrow Steamship Company vs. Kane*, 170 U. S. 100,

> "The constant tendency of judicial decisions in 'modern times has been in the direction of putting 'corporations upon the same footing as natural per-'sons in regard to the jurisdiction of suits by or 'against them." (p. 106.)

THIRD.

The essential conditions having been shown to exist, the State Court obtained jurisdiction of the plaintiff in error by service of process on one of its directors within the State.

The claim is made by its counsel that in order to make such service valid, the director must have been employed at the time in the company's business. That is probably the rule in the case of an agent or employee of a foreign corporation who has been served with process. The cases cited by counsel in his brief, go no further than that. No case, so far as I am aware, holds that where a foreign corporation is domiciled or doing business in another State, valid service may not be made on an officer or director of the corporation, even though such officer or director may not be there engaged in the business of the corporation. In every case where service upon an officer or a director of a foreign corporation has been set aside, it has been on the ground that the corporation was not doing business in the State, and never upon the ground that the officer or director, not being there engaged in the company's business, was not a proper representative of the company upon whom service could be made.

In *St. Clair vs. Cox*, 106 U. S., 353, directors are particularly named as proper officers of a corporation on whom service of process may be made.

In *Conley vs. Mathieson Alkali Works*, 190 U. S. 406, service of the summons was made on a director, but the service was held bad for the sole reason that the defendant, a foreign corporation, was not doing business in New York, where the action was commenced. No suggestion was made that a director was not a proper officer on whom service of process against the corporation might be made.

The rule that service upon its agent, of process against a corporation, in order to be valid, must be upon an agent who at the time represents the corporation in the State, in other words, is employed there in its business, is a reasonable one, but it has no application to the service of process upon the officers and directors of the corporation. In the broadest sense the directors have charge and oversight over its entire business, and therefore may be said to represent it, wherever that business is carried on. A director of the plaintiff in error bears the same relation to its insurance business in New York that he does to its business in Pennsylvania, has the same duty, care, and oversight over the one as over the other, and as truly represents the business of the company in one state as in the other. In most, if not all, of the States directors are deemed proper officers on whom service of process against a corporation may be made. It is certainly so in New York. (Code Civ. Pro., secs. 431, 432.)

In *Hiller vs. R. R. Co.*, 70 N. Y., 223, the court says:

> "A director of a corporation is one of its principal 'officers and agents. He is charged with the duty 'of protecting and promoting its interests. It would 'be a clear case of malfeasance if process in a suit 'against a corporation was served upon him and he 'did not place it before the Board of Directors, or in 'the hands of the proper officers, so that the corpo-'ration would suffer no detriment. Hence service 'upon such an officer must within the general rule 'be sufficient. It can make no difference that this is 'the case of a foreign corporation. The statutes 'gives the Supreme Court jurisdiction of suits against 'such corporations and by what service that juris-'diction shall be acquired must within the general 'rule above be determined by the Legislature" (p. 228).

Also *Childs vs. Harris Mfg. Co.*, 104 N. Y. 477.

In *Insurance Co. vs. Woodworth*, 111 U. S., 146, it is declared to be the rule observed by the Federal Courts, that

"A corporation of one State doing business in 'another is suable in the courts of the United States 'established in the latter State if the laws of that 'State so provide, and in the manner provided by 'those laws."

To the same effect is *Amy vs. Watertown*, 130 U. S. 301, where it was held that in actions commenced in the United States Courts the mode of service of *mesne* process upon corporations will be governed by the law and practice of the State within whose limits this action was commenced. The Federal cases seem to hold that in actions in the State courts against foreign corporations, where the corporation is found within the State for the purposes of the suit, jurisdiction on it may be obtained by service of process upon an officer, director, or agent of the corporation, in the manner provided by the laws of the State, with the exception that if the laws authorize service on an agent it must be one who represents the corporation in the State.

The defendant has certainly shown no sufficient reason why the plaintiff should have been turned out of the Circuit Court into which this case has been removed, to pursue his remedy in the Pennsylvania courts at great inconvenience and expense to himself.

FOURTH.

For the several reasons pointed out herein, it is submitted that the question certified to this Court should be answered in the affirmative.

HEMAN W. MORRIS,
For Defendant in Error.